No. 12866.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA and JAMES J. BOYLE, United States Marshal for the Southern District of California,

Appellees.

APPELLEES' BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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Statement of Jurisdiction.

This is an appeal from an Order of the District Court of the United States for the Southern District of California dismissing Appellant's Petition for a Writ of Habeas Corpus [Record 33, 34]. It is consolidated with an appeal from an Order of the same Court denying Appellant's Motion to Vacate and for Relief pursuant to Section 2255, Title 28, United States Code. The Petition for Writ of Habeas Corpus appears at page 29 of the Record. The Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code, appears at page 6 of the Record. Prior to filing of the Petition for Writ of Habeas Corpus the Appellant had surrendered for execution of the Judgment of Conviction imposed on him on Count 3 of Indictment No. 20069 in the District Court of the United States for the Southern District of

California, Central Division. His bail had been exonerated and service of the sentence commenced.

The questions presented in both appeals are predicated upon the same Record and concern the same facts. The District Court which heard the Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code, was the same District Court which had imposed the sentence under said Indictment. The Motion was heard before the same Judge of said Court. Whereas this Court has held that said Section 2255, Title 28, United States Code, is unconstitutional[1] it cannot properly be said that the District Court had jurisdiction to hear that Petition but the statutes which purportedly conferred jurisdiction upon the District Court to hear said Petition are Title 28, United States Code, Section 2255, and Title 28, United States Code, Section 2241. This Court has jurisdiction to determine the appeal from the Order denying said Motion and to determine the appeal from the Petition for a Writ of Habeas Corpus by virtue of Title 28, United States Code, Section 2253.

Statement of the Case.

On August 1, 1949, Appellant was sentenced to imprisonment for a term of one year upon each of three counts which severally charge him with the offense of false claim of citizenship in violation of Section 746 (a)(18), Title 8, United States Code. Two of said judgments of conviction related to Case No. 20069 Criminal in the District Court of the United States for the Southern District of California, Central Division, and one of said judgments

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[1]*Hayman v. United States,* 187 F. 2d 456.

of conviction related to Case No. 20604 Criminal in the District Court of the United States for the Southern District of California, Central Division. An appeal was taken as to all of said convictions and was heard in this Court as Case No. 12375. The Opinion of this Court reversing the judgment in Case No. 20604 Criminal and reversing the judgment as to Count 1 in Case No. 20069 Criminal and affirming the judgment as to Count 3 in Case No. 20069 Criminal is reported at 181 F. 2d 505. The Opinion of this Court denying a Supplemental Petition for Rehearing and Motion to Remand as to that part of the case which resulted in an affirmance of the judgment of conviction as to said Count 3 is reported at 186 F. 2d 903. Prior to his supplemental petition for rehearing Appellant petitioned the Supreme Court of the United States for a Writ of Certiorari. This was denied. Reduced to its simplest terms, the point made by Appellant in his Motion to Vacate and for Relief Pursuant to Section 2255, and again made in his Petition for Writ of Habeas Corpus, is that he was charged in the Indictment with one offense and was convicted of another. The point thus urged at the hearing of said Motion and said Petition for Writ of Habeas Corpus is the identical point presented to this Court on the Supplemental Petition for Rehearing and Motion to Remand, and disposed of by the judgment of this Court January 19, 1951, in its Opinion reported at 186 F. 2d 903.

Argument.

Appellant misconceives the function of a writ of habeas corpus. It is not in the nature of an appeal by which claimed errors in a criminal trial are examined. Such claims of error are properly reviewable only in an appeal from the judgment in a criminal case. Appellant herein sought such a review following his conviction in the District Court. That review was accorded him by this Court. After affirmance of the judgment now being executed, the Appellant petitioned the Supreme Court for certiorari and there presented exactly the argument now being repeated in this appeal. After the Supreme Court denied certiorari, this Court engaged in the extraordinary procedure of entertaining what was designated "Supplemental Petition for Rehearing and Motion to Remand." This was in effect a second petition for rehearing in this Court. At that time Appellant urged that he had been charged with making a false claim of citizenship to J. E. Siu whereas the proof was that he had made that false claim of citzenship to one Hopkins instead. It was argued to this Court that the language of the Indictment was that the false claim had been made to "J. E. Siu, a deputy Sheriff of the County of Los Angeles" and that the material description was the language "a deputy sheriff". The identification of the particular deputy as being named Siu, it was contended was merely continuing descriptive matter not vital to the charge. This Court, after considering the Supplemental Petition, adopted the view that the most that had occurred was a variance and that the variance was not material. In its Opinion in that regard, this Court said:

Rule 52(a) of the Rules of Criminal Procedure provides: "Any error, defect, irregularity or *variance* which

does not affect substantial rights shall be disregarded." (Emphasis added.) This provision is said to restate the prior law. In the instant case we have a variance in names. Not every such variance is fatal.

Ex Parte Hull, 312 U. S. 546;

Bennett v. United States, 227 U. S. 333;

Ferrari v. United States, 9 Cir., 169 F. 2d 353.

Measuring the situation in the instant case by the yardstick announced in the cited cases, we find no fatal variance. The entire proceeding relating to giving of the false answer to the deputy sheriff, was carried on in a room in which Deputy Sheriff Siu was present most, if not all, of the time. The document upon which the alleged false answer of appellant was recorded was in evidence at the trial. It would be idle to say that the able counsel representing appellant was not advised of the entire circumstances of the making of the answer if not of the particular party to whom made. He was not concerned so much with that phase of the case because of his conception of the law. It is evident that the same defense would have been made had Hopkins been named in the indictment. As an evidence of how little concern counsel for appellant placed on the particular individual in the Sheriff's office to whom the alleged statements were made, we cite his statements to the trial court in argument for a new trial. In explanation as to why the appellant was not called as a witness, counsel stated:

> "The facts are so simple in the case. In fact, we did not dispute them, stipulating that he was an alien, and, secondly, virtually admitting that on the occasions of his interviews by booking officers . . . that he was asked certain questions with reference

to his birth, . . . it was for that reason, Your Honor, that I did not place the defendant on the stand, because, if he had been, he would testify precisely that way under oath, . . . I may have made a mistake because the jury didn't hear the sound of the voice of the defendant, but I could see no purpose because there was nothing to deny as far as the actual facts of the case were concerned.

"This statement of counsel, made after the trial, can be relevant only to point up the theory on which the case was tried and leaves no reason for a finding of surprise and that a different defense would or could have been urged in the event Hopkins had been named in the indictment. The evidence at the trial was in part documentary. It is of such a character as to firmly peg the crime charged to the circumstances of time and place and persons present in such a manner as to fully protect appellant against another prosecution for the same offense. He would have no difficulty were another prosecution attempted in showing former jeopardy."

Appellant had argued at the hearing which preceded the Opinion just quoted, that he was the victim of an attempted amendment to the Indictment. Having failed in that argument in this Court, he simply reiterated it in the District Court by the vehicle of a Petition for Writ of Habeas Corpus and a Motion grounded upon the unconstitutional Section 2255, Title 28, United States Code. The District Court perceiving that it was merely asked to re-examine what had already been examined by this Court, refused relief to petitioner who now reargues here what has already been reviewed here.

The Writ of Habeas Corpus is not available to secure a new review of matters passed upon in the trial of the case and reviewed in the Appellate Court.

> *Berkoff v. Humphrey,* 159 F. 2d 5, at p. 7 (C. C. A. 8) 1947:
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> "* * * The hearing on habeas corpus is not in the nature of an appeal nor is it a substitute for the functions of the trial court. This is true as to controverted issues of fact and as to disputed issues of law 'whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court.' Henry v. Henkel, 235 U. S. 219, 229, 35 S. Ct. 54, 57, 59 L. Ed. 203. 'It is fundamental that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved. Otherwise every judgment of conviction would be subject to collateral attack and review on habeas corpus on the ground that no offense was charged or proved.' Knewel v. Egan, 268 U. S. 442, 446, 45 S. Ct. 522, 524, 69 L. Ed. 1036."

A writ of habeas corpus is not available to a defendant who, having questions which could not be raised in the trial court, failed to raise them.

> *Dorsey v. Gill,* 148 F. 2d 857, at p. 872; Court of Appeals, District of Columbia, 1945:
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> "It has been suggested that the Supreme Court in the Bowen case, and in other recent cases, intended to say that the writ of habeas corpus is available,

not only when jurisdiction is lost during the course of the proceeding by deprivation of a constitutional right, but also whenever a petitioner is able to allege that he failed to enjoy a constitutional right. We see no reason to impute such an intention to the Supreme Court. A careful reading of its opinions will show that it is not the purpose of the writ to *compel* or *require* enjoyment of constitutional rights in all cases where, for example, they have been waived, intelligently by the petitioner himself, or for him by counsel. The applicable rule has been well stated by Judge Parker: 'Ordinarily, failure to raise a constitutional question during trial amounts to waiver thereof (United States [ex rel. Jackson] v. Brady, 4 Cir., 133 F. 2d 476, 481), and only where failure to raise the question at the trial was due to ignorance, duress or other reason for which petitioner should not be held responsible, may resort be had to habeas corpus in the federal courts, and, even in these cases, only where it is made to appear that there has been such gross violation of constitutional right as to deny to the prisoner the substance of a fair trial and thus oust the court of jurisdiction to impose sentence.'

"Our conclusion is fortified, also, by the Supreme Court's contemporaneous restatement of the rule previously declared that the writ of habeas corpus cannot be used for the purpose of an appeal, or to retry the issues, whether of law or of fact. Bearing in mind that the use of the writ, in a case involving deprivation of constitutional rights, is limited to the exceptional situation in which it is the only means of preserving such rights, it is obvious that no useful or necessary purpose would be served by trying—over and over again—in habeas corpus proceedings, the same questions which were fully considered and fairly determined in the original proceeding."

Whatever the boundaries are of the power of the District Court under a writ of habeas corpus, it cannot be said that there lies within such boundaries the power of such District Court to act as a reviewing court on a habeas corpus proceeding to both the United States Court of Appeals and the Supreme Court on matters and things previously considered and decided by such Appellate Courts on appeal in the specific case sought to be re-litigated again before the District Court. It is true that the Supreme Court has acted only to the extent of a denial of a petition for a writ of certiorari but it did act to that extent and this Court, in the previously quoted Opinion, acted decisively after briefs and argument upon the specific issue now urged again upon this Court of Appeals. There must be an end to litigation and that end is not appropriately deferred beyond the second Opinion of the Court of Appeals and the declination of the Supreme Court to take the case.

The Petition to Vacate and for Relief under Section 2255 of Title 28, United States Code, was additionally inappropriate by reason of the unconstitutionality of that statute as proclaimed in *Hayman v. United States,* 187 F. 2d 456.

Conclusion.

It is respectfully submitted that the Orders appealed from should be affirmed.

Respectfully submitted,

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United States Attorney,
Attorney for Appellees.